

ATTACHMENT 5

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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SURGICAL INSTRUMENT SERVICE
COMPANY, INC.,

Plaintiff,

v.

INTUITIVE SURGICAL, INC.,

Defendant.

Case No.: 3:21-cv-03496-VC

Updated Bero Report Schedules / Errata Sheet
February 25, 2023

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On December 2, 2022, I issued an expert report (the “Bero Report”) in this matter. In the Bero Report, I provided expert opinions on damages on behalf of Surgical Instrument Service Company, Inc. (“SIS”) in *Surgical Instrument Service Company, Inc. v. Intuitive Surgical, Inc.*, Case No. 3:21-cv-03496-VC. The Bero Report included the **Schedule 1 – 16** series.

On January 18, 2023, Loren K. Smith, PH.D., issued a rebuttal report addressing my damages opinions stated in the Bero Report (the “Smith Rebuttal Report”).¹ Among other criticisms, the Smith Rebuttal Report identifies 2018 to 2020 costs that were mis-categorized as 2020 to 2022 costs as part of a cell referencing error in the Bero Report’s “distributor model.”² To account for this, I have adjusted my analyses accordingly.

The Smith Rebuttal Report also addresses the Bero Report’s use of a 72% repair yield and suggests a repair yield approximating 69% is more appropriate.³ As described in the Bero Report, the 72% repair yield % I used is based on various data points, which indicate this % could be higher than 72%.⁴ Nonetheless, I have updated my analyses using 69.35%, the lowest of the identified repair yield % data points.

For errata purposes, I have updated the following Bero Report schedules for these two items: **Schedules 1.0, 2.0, 2.1, 2.2, 3.0, 3.1, 4.0, 4.1, 4.2, 4.3, 4.4, 4.5, 5.0, 5.1, 5.2, 5.3, 16.1** and **16.2**. I have included these **Updated Schedules** along with all non-updated **Schedules** in the attached **Updated Schedule 1 – 16** series.⁵ These **Updated Schedules** supersede the Bero Report’s **Schedule 1 – 16** series, and do not change the substance of my opinions contained in the Bero Report.

Based on my **Updated Schedules**, I have also updated the Bero Report’s **Table 1** and **Table 5**, both of which supersede the corresponding tables in the Bero Report. **Updated Table 1** below shows the updated damages amounts:⁶

¹ I will respond to other items the Smith Rebuttal Report addressed that are not addressed herein in my second rebuttal report due March 1, 2023.

² Smith Rebuttal Report 16-17. The Smith Rebuttal Report refers to these costs as “payments” even though they were described as “costs” in the Bero Report. *See, e.g.*, the description on Bero Report **Schedule 3.1**.

³ Smith Rebuttal Report 16-17. Rounded to 2 decimal points, this 69% approximates 69.35%.

⁴ *See, e.g.*, Bero Report 51-52 and **Schedule 2.2** at FN [J].

⁵ The Bero Report schedules that do not have to be updated are not referred to as “Updated Schedules.”

⁶ **Updated Schedule 1.0**.

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Updated Table 1: Damages Summary

	Scenario 1		Scenario 2	
<u>Discounted lost profits</u>				
In-house model	\$98,855,878		\$54,099,123 to	\$77,650,884
Distributor model	\$36,492,836		\$19,905,925 to	\$28,597,644
Lanham Act			\$258,367,896 to	\$371,219,363

Updated Table 5 below shows the updated ‘Would-Have-Been’ EndoWrist repair units:⁷

Updated Table 5: ‘Would-Have-Been’ EndoWrist repair units

	Scenario 1		Scenario 2	
EndoWrist instruments potentially repairable by SIS – units	2,418,163		1,771,630 to	2,118,209
Expired EndoWrist instrument - units	1,450,896		1,062,977 to	1,270,924
SIS market share units	797,993		584,637 to	699,008
SIS converted units	470,187		303,952 to	391,199
SIS collected units	329,132		212,766 to	273,840
Would-have-been Lost EndoWrist repair units	228,271		147,565 to	189,923
Market penetration (% of total units)	9%		8% to	9%

My **Updated Schedules** and **Updated Tables** described herein are based upon information that is presently known and available to me. If additional information is made available, I may update these accordingly.

Respectfully submitted,



Richard F. Bero, CPA, CVA
February 25, 2023

⁷ Updated Schedules 2.2, 4.2 and 4.5.

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Updated Schedule 2.0	Scenario 1 - Discounted Lost Profits: In-house Model
Updated Schedule 2.1	Scenario 1 - Undiscounted Lost Profits: In-house Model
Updated Schedule 2.2	Scenario 1 - Lost EndoWrist Repair Units
Updated Schedule 3.0	Scenario 1 - Discounted Lost Profits: Distributor Model
Updated Schedule 3.1	Scenario 1 - Undiscounted Lost Profits: Distributor Model
Updated Schedule 4.0	Scenario 2 - Discounted Lost Profits: In-house Model (2 Year X/Xi Delay)
Updated Schedule 4.1	Scenario 2 - Undiscounted Lost Profits: In-house Model (2 Year X/Xi Delay)
Updated Schedule 4.2	Scenario 2 - Lost EndoWrist Repair Units (2 Year X/Xi Delay)
Updated Schedule 4.3	Scenario 2 - Discounted Lost Profits: In-house Model (1 Year X/Xi Delay)
Updated Schedule 4.4	Scenario 2 - Undiscounted Lost Profits: In-house Model (1 Year X/Xi Delay)
Updated Schedule 4.5	Scenario 2 - Lost EndoWrist Repair Units (1 Year X/Xi Delay)
Updated Schedule 5.0	Scenario 2 - Discounted Lost Profits: Distributor Model (2 Year X/Xi Delay)
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Updated Schedule 5.2	Scenario 2 - Discounted Lost Profits: Distributor Model (1 Year X/Xi Delay)
Updated Schedule 5.3	Scenario 2 - Undiscounted Lost Profits: Distributor Model (1 Year X/Xi Delay)
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Schedule 9.1	Intuitive's "Top 5" X/Xi EndoWrist Instrument Units:2018 - June 2022

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Scenario 1 - Lost EndoWrist Repair Units

Updated Schedule 2.2

	2020	2021	2022	2023	2024	2025	Total
<u>EndoWrist instruments potentially repairable by SIS - units</u>							
[A] da Vinci S/Si	52,970	22,411	8,214	3,839	1,928	1,077	90,439
[A] da Vinci X/Xi	299,954	346,579	365,304	422,719	455,982	437,186	2,327,724
[A] Total	352,924	368,990	373,518	426,558	457,910	438,263	2,418,163
[B] Expiration rate of new sales units	60%	60%	60%	60%	60%	60%	60%
<u>Expired EndoWrist instrument - units</u>							
[C] da Vinci S/Si	31,782	13,447	4,928	2,303	1,157	646	54,263
[C] da Vinci X/Xi	179,972	207,947	219,182	253,631	273,589	262,312	1,396,633
[C] Total	211,754	221,394	224,110	255,934	274,746	262,958	1,450,896
[D] SIS market share rate	55%	55%	55%	55%	55%	55%	55%
<u>SIS market share units</u>							
[E] da Vinci S/Si	17,480	7,396	2,710	1,267	636	355	29,844
[E] da Vinci X/Xi	98,985	114,371	120,550	139,497	150,474	144,272	768,149
[E] Total	116,465	121,767	123,260	140,764	151,110	144,627	797,993
<u>SIS conversion factor</u>							
[F] da Vinci S/Si	15%	50%	70%	70%	70%	70%	
[F] da Vinci X/Xi	15%	50%	70%	70%	70%	70%	
<u>SIS converted units</u>							
[G] da Vinci S/Si	2,622	3,698	1,897	887	445	249	9,798
[G] da Vinci X/Xi	14,848	57,186	84,385	97,648	105,332	100,990	460,389
[G] Total	17,470	60,884	86,282	98,535	105,777	101,239	470,187
[H] Collection rate of SIS converted units	70%	70%	70%	70%	70%	70%	70%
<u>SIS collected units</u>							
[I] da Vinci S/Si	1,835	2,589	1,328	621	312	174	6,859
[I] da Vinci X/Xi	10,394	40,030	59,070	68,354	73,732	70,693	322,273
[I] Total	12,229	42,619	60,398	68,975	74,044	70,867	329,132
[J] Repair yield of SIS would-have-been units	69.35%	69.35%	69.35%	69.35%	69.35%	69.35%	69.35%
<u>Would-have-been Lost EndoWrist repair units</u>							
[K] da Vinci S/Si	1,273	1,796	921	431	216	121	4,758
[K] da Vinci X/Xi	7,209	27,763	40,968	47,407	51,137	49,029	223,513
[K] Total	8,482	29,559	41,889	47,838	51,353	49,150	228,271
[L] Market penetration (% of total units)	2%	8%	11%	11%	11%	11%	9%

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Scenario 1 - Lost EndoWrist Repair Units

Updated Schedule 2.2

	2020	2021	2022	2023	2024	2025	Total
<u>Actual conversion rate</u>							
[M] da Vinci S/Si					15%	50%	
[M] da Vinci X/Xi					15%	50%	
<u>Actual EndoWrist repair units</u>							
[N] da Vinci S/Si					46	86	132
[N] da Vinci X/Xi					10,958	35,021	45,979
[N] Total					11,004	35,107	46,111
<u>Lost EndoWrist repair units</u>							
[O] da Vinci S/Si	1,273	1,796	921	431	170	35	4,626
[O] da Vinci X/Xi	7,209	27,763	40,968	47,407	40,179	14,008	177,534
[O] Total	8,482	29,559	41,889	47,838	40,349	14,043	182,160

NOTES / SOURCES:

Note: Any minor differences are due to rounding.

[A] Per Schedule 6.0.

[B] Per Schedule 7.0.

[C] = [A] * [B]

[D] Per <https://web.archive.org/web/20191108191050/https://www.vizientinc.com/what-we-do> as of November 8, 2019, "50% of the nation's acute care providers are Vizient members." Per <https://www.vizientinc.com/> as of November 29, 2022, Vizient has ">60% of acute care hospitals in the U.S." For purposes of my analysis, I use 55%. See discussion in my report.

[E] = [C] * [D]

[F] Per discussion with Keith Johnson and Greg Posdal, SIS anticipated a quick ramp up in 2020, both in sales and in-house repair capabilities. According to Jean Sargent there would have been a transition timeframe conversion for this type of program. In 2020, or Year 1, 30% of Vizient's acute care providers would have reasonably converted. In 2021, or Year 2, and thereafter, 70% would have reasonably converted. I apply a 15% conversion factor in 2020, or Year 1 (i.e. mid-point between 0% January 1 and 30% December 31st). I apply a 50% conversion factor in 2021, or Year 2 (i.e., mid-point between 30% January 1 and 70% December 31st). I apply a 70% conversion factor in 2022, or Year 3, and thereafter. Per May Dep. 113-114 (November 3, 2022), if the Xi had the same security measures as the Si, Restore would have been able to repair the Xi's as of January 2020.

[G] = [E] * [F]

[H] Per Morales 30(b)(6) Dep. Ex. 143 (Intuitive-00626597-626616 at 604), where Intuitive targets a collection rate of 70%. See *a/so*, Intuitive-00620200 where Intuitive assumes a collection rate of 70%. See *a/so*, Morales 30(b)(6) Dep. Ex. 141 (at pdf page 1), where Intuitive targets a collection rate of 80%. Per discussion with Jean Sargent, I understand for an expensive instrument such as an EndoWrist, a 75% collection rate would be reasonable.

[I] = [G] * [H]

[J] Deposition of Clifton Parker 43-45, 178-179 (October 25, 2022). Per Restore-00094918-00094956 at 922 (Parker Dep. Ex. 121), 215 out of 310 instruments (approximately 69.35%) collected in a 2-week sample that had lives on them passed Restore's inspection (i.e., were repairable). Note: Per Morales 30(b)(6) Dep. Ex. 143 (Intuitive-00626597-626616 at 609), where Intuitive realized a yield of 85%. See *a/so*, Morales 30(b)(6) Dep. Ex. 143 (Intuitive-00626597-626616 at 612), where Intuitive targeted a yield of 85% to 95%. Schedule 14.0 shows the repair yield of SIS collectable units was approximately 88%. For purposes of my analysis, I use approximately 69.35%.

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Scenario 1 - Lost EndoWrist Repair Units

Updated Schedule 2.2

2020	2021	2022	2023	2024	2025	Total
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[K] = [I] * [J]

[L] = [K] / [A]

[M] Assuming trial is resolved in or about January 1, 2024, SIS would then begin ramping up. For the Actual EndoWrist repair units, I use the Year 1, Year 2 and Year 3 market conversion rates addressed at [F] above. Currently, I assume Year 1 is 2024 and the first year SIS will begin selling its repair program again. Per May Dep. 60 (November 3, 2022), Restore will have the technical capability to change the usage limitations of the EndoWrist X/Xi's in the third or fourth quarter of 2023. For purposes of this analysis, I assume the conversion rate for the S/Si and X/Xi would be the same starting January 1, 2024.

[N] = [E] * [H] * [J] * [M]

[O] = [K] - [N]